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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-149

ROBERT L. TAYLOR,

Petitioner,

v.

STATE OF TENNESSEE by THOMAS H. SHRIVER, *ex rel.* THOMAS A. HIGGINS; STATE OF TENNESSEE *ex rel.* JOHN J. THOMASON; DAVID M. PACK, Attorney General and Reporter of the STATE OF TENNESSEE; THOMAS F. TURLEY, JR.; ROBERT E. COOPER; T. MACK BLACKBURN; HOWARD KESLEY; and JOHN W. WILSON,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

INTRODUCTION

A petition for writ of certiorari in the above styled case was served on the respondent David M. Pack, Attorney General and Reporter for the State of Tennessee, on July 19, 1973. This brief is hereby submitted in response to said petition and is basically a motion to dismiss.

For the purpose of this brief, respondent adopts the material in the petition included under the headings of "Opinions Below"; "Jurisdiction"; "Questions Presented For Review"; "Appendix B" accompanying the petition under separate cover; and, except as refuted herein, the "Statement of the Case."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The question involved is the process provided in the state of Tennessee for filling the office of judge of the Supreme Court upon the occurrence of a vacancy.

The petitioner attempted to call and hold his own election, by-passing all of the constitutional and statutory processes provided by the Constitution of Tennessee, and the pertinent statutes of that state. None of the cases relied upon by the petitioner involve a set of facts even closely resembling that of the case sub judice.

The writ should not be granted because it fails to present a justiciable issue, and there is lack of jurisdiction in this court on a matter so uniquely left to the states by the Constitution of the United States.

ARGUMENT

Following the admittedly erroneous failure on the part of the Governor of Tennessee to make a proper appointment in the filling of a vacancy on the Supreme Court of the State of Tennessee, the petitioner undertook simply by advertisement in newspapers to conduct a write-in campaign for that office. No effort was made on his part to require an election for that office to be placed on the ballots in the statewide election being held at the time this

vacancy should have been filled. As a result some three thousand voters wrote in the name of the petitioner, the same coming from less than one-half of the counties of the state. The State Supreme Court properly held that this did not constitute an election and the vacancy remained, whereupon the process established by state law for filling a vacancy was initiated and the vacancy is now filled according to Tennessee law.

This Honorable Court, in the case of *Lester G. Maddox, et al -vs- Ben W. Fortson, et al*, reported in 90 S. Ct. 999 (1970), by per curiam opinion, dismissed the petition for writ of certiorari for want of jurisdiction. In that case petitioners sought to have declared void the provision in the constitution of Georgia that prohibits a governor from succeeding himself. The principles and the reasoning behind that decision, although factually different, is equally applicable to the case sub judice.

This Court, in *Williams -vs- Rhodes*, 89 S. Ct. 5, in setting a guideline for considering state matters, said:

> "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification."

In *Taylor and Marshall -vs- Beckham*, 178 U.S. 548, pp. 570, 20 S. Ct. 890, 898, 44 L. Ed. 187 (1889), it was said:

> "It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their

election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."

In *Wilson -vs- North Carolina*, 169 U.S. 586, 594, 18 S. Ct. 435, 438, 42 L. Ed. 865 (1897), the court said:

"In its internal administration the state (so far as concerns the federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office."

"So long as our present dual form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the States.' *The Collector v. Day*, 11 Wall. 113, 124, 20 L. Ed. 122." *Brush v. Commissioner*, 300 U.S. 352, 364, 57 S. Ct. 495, 497, 81 L. Ed. 691.

In *Fortson -vs- Morris*, 385 U.S. 231, 234, 87 S. Ct. 446, 448, 17 L. Ed. 2d 330 (1967), it was held:

"There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor."

This would be equally true regarding the method used by a state to select a member of its Supreme Court.

CONCLUSION

Respondents, for the reasons aforesaid, suggest that the petition herein should be dismissed for want of jurisdiction and for the reason that it fails to state a justiciable issue.

It is THEREFORE respectfully submitted that the Petition for Writ of Certiorari herein should be denied.

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State of Tennessee

Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Brief in Opposition to the Petition for the Writ of Certiorari to the Supreme Court of Tennessee has this day been forwarded, by first class postage paid mail, to the Honorable Cecil D. Branstetter, Attorney-at-Law, 216 Third Avenue, North, Nashville, Tennessee 37201; to the Honorable Ward DeWitt, Jr., Attorney-at Law, 26th Floor, L & C Tower, Nashville, Tennessee; to the Honorable Hewitt P. Tomlin, Jr., Attorney-at-Law, 106 S. Liberty Street, Jackson, Tennessee 38301; to the Honorable Thomas A. Higgins, 18th Floor, Third National Bank Building, Nashville, Tennessee; to the Honorable Thomas H. Shriver, District Attorney General, Metropolitan Courthouse, Nashville, Tennessee 37201, this ..... day of August, 1973.

ROBERT H. ROBERTS,
Assistant Attorney General